Perbadanan Pengurusan Bella Vista v CA Management Services Sdn Bhd

HIGH COURT (KUALA LUMPUR) — COMPANIES WINDING-UP NO D5–28–636 OF 2008
RAMLY ALI J
14 JANUARY 2009

Civil Procedure — Notice of motion — Winding up petition — Application to strike out petition — Intitulement — Failure to stipulate provision on which respondent relied to strike out petition — Whether failure to include renders notice flawed — Whether objection raised by petitioner was frivolous and vexatious

Civil Procedure — Striking out — Winding up petition — Whether plain and obvious case for plaintiff's petition to be struck off — Whether plaintiff's petition scandalous, frivolous and vexatious — Whether actions were malicious — Whether petition intended to cause serious prejudice and/or embarrassment to respondent — Rules of the High Court 1980 O 18 r 19

Companies and Corporations — Winding up — Inability to pay debt — Whether company commercially solvent — Company to prove ability to pay its debt — Whether debt in question seriously disputed — Whether petitioner a creditor — Winding up petition not legitimate means to enforce payment of disputed debt — Companies Act 1965 s 218(1)(e), (2)(a)

Companies and Corporations — Winding up — Opposition to winding up — Presenting petition to wind up — Application to restrain — Notice of intention to appear — Whether filing of notice mandatory — Whether filing of affidavit in opposition sufficient to show intention to oppose petition — Whether petition ought to be struck out for want of compliance — Companies Act 1965 s 221(2) — Companies (Winding up) Rules 1972 rr 28(1), 29

The petitioner had presented a petition to wind up the respondent company for a debt sum of RM19,894.36, which the former claimed was a debt due to them from the respondent. The respondent however, submitted that there was no debt due and payable. Further, to prove that the respondent was solvent and was capable of satisfying any debt that becomes due and payable

at any time, the respondent had secured a sum of RM20,000 and placed the said sum with the respondent solicitors. The respondent had, in opposing the petition, filed a motion to strike out the petition. The petitioner had raised a preliminary objection for the non-compliance of r 28(1) of the Companies (Winding-up) Rules 1972, namely for the failure by the respondent to file a notice of intention to appear to oppose the petition. They contended that the filing of such notice, in Form 8 by the respondent was mandatory, and by virtue of the latter's failure to adhere to the mandatory provisions, the petitioner prayed that the respondent's opposition to the petition be stuck out in limine. The petitioner also raised the issue that the respondent's notice of motion was flawed as it did not stipulate the provision on which the respondent relied on to strike out the petition. The petitioner contended that there was no 'intitulement' in the respondent's motion to strike out.

Held, dismissing the petition with costs:

(1) Rule 28(1) does not refer to the respondent. If the intention of the rule was to include the respondent of a petition, it would have made it very clear that the respondent itself would have to file the notice of intention to appear. Rule 28(1), refers to 'every person who intends to appear'. It was clear that the respondent by the service of the petition was a party to the petition and he need not give notice of his intention to appear. The respondent was already a party to the winding up petition (see para 9).

(2) Further, from the said Form 8, it was clear that r 28(1) only applied to 'any other person' apart from the respondent who intended to appear at the hearing to support or oppose the petition. It never had the intention of instructing the respondent to file the notice of intention to appear. The above proposition was further fortified by reading the opening wordings of s 221(2) of the Companies Act 1965 (see para 11).

(3) There was no provision in law that allowed the respondent in this matter to change the intitulement on the petition or to change the heading in a motion filed under a petition in order to file an application to strike out the said petition. The notice of motion is not an originating process and therefore it must follow the intitulement of the originating process, ie the petition. The intitulement of the petition is the heading and it cannot be changed by the petitioner or respondent every time the parties file interlocutory application to a petition or other originating processes (originating motion or originating summons) (see para 29).

(4) There was no evidence to confirm that the petitioner was a creditor and was entitled to present this petition as against the respondent nor was

there any evidence that the petitioner was entitled to the RM19,894.36 or any part thereof. Based on the above, the petition was an abuse of process where the petitioner not being a creditor had presented the petition knowing fully well that they were not entitled to the sum or any part thereof. Based on the above, the petitioner has no locus to present a petition to wind up the respondent (see paras 53–54).

[Bahasa Malaysia summary

Pempetisyen telah mengemukakan satu petisyen untuk menggulungkan syarikat responden bagi sejumlah hutang sebanyak RM19,894.36, yang didakwa adalah hutang yang tertunggak kepada mereka daripada responden. Walau bagaimanapun, responden menghujahkan bahawa tiada hutang yang tertunggak dan perlu dibayar. Selanjutnya, untuk membuktikan yang responden adalan solven dan mampu menjelaskan mana-mana hutang yang menjadi tertunggak dan perlu dibayar pada bila-bila masa, responden telah membuat jaminan sebanyak RM20,000 dan menyimpan wang tersebut dengan peguamcara responden. Responden dalam menentang petisyen, telah memfailkan usul untuk membatalkan petisyen. Pempetisyen telah membangkitkan bantahan awal atas ketidakpatuhan peraturan 28(1) Peraturan-Peraturan (Penggulungan) Syarikat 1972, iaitu bagi kegagalan oleh responden untuk memfailkan notis niat untuk hadir bagi menentang petisyen. Mereka menegaskan bahawa pemfailan notis tersebut, di dalam Borang 8 oleh responden adalah mandatori, dan berdasarkan kegagalan untuk memenuhi peruntukan mandatori, pempetisyen memohon penentangan responden kepada petisyen dibatalkan sedari awalnya. Pempetisyen juga membangkitkan isu bahawa notis usul responden adalah cacat kerana ianya tidak menyatakan peruntukan mana yang disandarkan oleh responden untuk membatalkan petisyen. Pempetisyen menegaskan bahawa tidak terdapat 'intitulement' di dalam usul responden untuk pembatalan.

Diputuskan, menolak petisyen dengan kos:

(1) Peraturan 28(1) tidak merujuk kepada responden. Jika kehendak peraturan untuk memasukkan responden di dalam petisyen, ia akan dijadikan jelas bahawa responden sendiri perlu memfailkan notis niat untuk hadir. Peraturan 28(1), merujuk kepada *'every person who intends to appear'*. Ia adalah jelas bahawa responden melalui penyampaian petisyen adalah pihak kepada petisyen dan ia tidak perlu untuk memberikan notis bagi niatnya untuk hadir. Responden sememangnya sudah menjadi pihak kepada petisyen penggulungan tersebut (lihat perenggan 9).

(2) Selanjutnya, daripada Borang 8 tersebut, adalah jelas bahawa peraturan 28(1) hanya terpakai kepada '*any other person*' selain daripada responden yang ingin hadir di pendengaran untuk menyokong atau menentang petisyen. Ia tiada niat langsung untuk mengarahkan responden bagi memfailkan notis niat untuk hadir. Kenyataan di atas adalah dikukuhkan dengan membaca ayat pembukaan s 221(2) Akta Syarikat 1965 (lihat perenggan 11).

(3) Tidak terdapat peruntukan dalam undang-undang yang membenarkan responden dalam perkara ini untuk menukar 'intitulement' atas petisyen atau untuk menukar tajuk dalam satu usul di bawah petisyen bagi memfailkan permohonan untuk membatalkan petisyen tersebut. Notis usul bukanlah proses pemula dan oleh itu ianya mestilah mengikuti 'intitulement' proses pemula, iaitu petisyen. 'Intitulement' petisyen adalah tajuknya dan ianya tidak boleh ditukar oleh pempetisyen atau responden setiap kali pihak-pihak memfailkan permohonan interlokutori kepada petisyen atau proses pemula yang lain (usul pemula atau saman pemula) (lihat perenggan 29).

(4) Tiada keterangan yang mengesahkan bahawa pempetisyen adalah pemiutang dan berhak untuk mengemukakan petisyen ini terhadap responden dan juga tiada apa-apa keterangan bahawa pempetisyen berhak kepada RM19,894.36 atau mana-mana bahagian daripadanya. Berdasarkan perkara di atas, petisyen tersebut adalah satu penyalahgunaan proses yang mana pempetisyen sebagai bukan pemiutang telah mengemukakan petisyen walaupun mengetahui sepenuhnya yang mereka tidak berhak kepada jumlah tersebut atau mana-mana bahagian daripadanya. Berdasarkan kepada perkara di atas, pempetisyen tidak mempunyai locus untuk mengemukakan petisyen untuk menggulungkan responden (lihat perenggan 53–54).]

Notes

For cases on inability to pay debt, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1081–1142.

For cases on notice of motion generally, see 2(3) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4835–4836.

For cases on opposition to winding up, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1318–1319.

For cases on striking out winding up petition, see 2(3) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 6797–6805.

Cases referred to

Boey Oi Leng (trading as Reka Construction & Trading) v Trans Resources Corporation Sdn Bhd [2001] MLJU 566; [2002] 1 CLJ 405, HC (refd)

CH Contruction and Trading v Langkah Cergas Sdn Bhd [1994] MLJU 418; [1994] 1 LNS 20, HC (refd)

Co-operative Central Bank Ltd v Escalation Enterprises Sdn Bhd [1996] MLJU 344, HC (refd)
Dayakuasa Holdings Sdn Bhd v Kayaal Holdings Sdn Bhd [2003] 2 MLJ 263, HC (refd)
Four Pillars Enterprises Co Ltd v Beiersdorf Aktiengesellschaft [1999] 1 SLR 737, CA (refd)
John Ang & Jega (suing as a firm) v Kulasingam a/l Sinatamby [2001] 2 MLJ 605, HC (refd)
Malayan Resourses Corporation Bhd v Juranas Sdn Bhd [2002] 3 MLJ 169, HC (refd)
Malta Timber Products Sdn Bhd v N & P Construction Sdn Bhd [2004] 1 MLJ 199, HC (refd)
Megat Najmuddin Dato' Seri (Dr) Megat Khas v Bank Bumiputra Malaysia Bhd [2002] 1 MLJ 385; [2002] 1 CLJ 645, FC (refd)
Mitsuo Nagamura lwn Aero Works (Melaka) Sdn Bhd [1996] 4 MLJ 209, HC (refd)
Salutory Avenue (M) Sdn Bhd v Malaysia Shipyard and Enginering Sdn Bhd [1999] 3 AMR 2659, HC (refd)
Securicor (M) Sdn Bhd v Universal Cars Sdn Bhd [1985] 1 MLJ 84, HC (refd)
Si & Si Sdn Bhd v Hazrabina Sdn Bhd [1996] 2 MLJ 509; [1996] 3 CLJ 657, SC (refd)
Sun Microsystems (M) Sdn Bhd v KS Eminent Systems Sdn Bhd [2000] 4 MLJ 565, HC (refd)
Wong Thai Kuai & Anor v Kansas Corp Sdn Bhd [2007] 4 MLJ 33, HC (refd)

Legislation referred to

Companies Act 1965 ss 218, 218(1)(e), (2)(a), 221(1), (2)
Companies (Winding Up) Rules 1972 rr 28, 28(1), (2), 29(1), Forms 8, 9
Rules of the High Court 1980 O 18 r 19

Gabriel Daniel (Paul Ong & Associates) for the petitioner.
Stanley Sinnappen (Zain Johnson & Associates) for the respondent.

Ramly Ali J:

[1] These grounds of judgment are in respect of the petitioner's petition to wind up the respondent company (encl 1); the respondent's application to strike out the petitioner's petition (encl 8); and the issue on the petitioner's preliminary objection relating to the respondent's application to strike out the petition.

[2] The petitioner has presented a petition to wind up the respondent company for a debt sum of RM19,894.36 only, which the petitioner claims is a debt due to the petitioner from the respondent.

[3] The respondent denies the debt and submits that there is no debt due and payable. Further, to show the court and the petitioner that the respondent is not insolvent, the respondent has secured a sum of RM20,000 and placed the said sum with the respondent solicitors to prove that the respondent is solvent and is capable of satisfying any debt that becomes due and payable at any time.

[4] The respondent has in order to oppose this petition filed a motion to strike out the petition.

[5] For the purpose of these grounds of judgment, the court shall deal with the petitioner's preliminary objection first.

THE PETITIONER'S PRELIMINARY OBJECTION

[6] The petitioner has raised preliminary objection for non-compliance of r 28(1) of the Companies (Winding Up) Rules 1972 — for failure by the respondent to file a notice of intention to appear to oppose the petition. The petitioner contends that the filing of such notice, in Form 8 by the respondent is mandatory, and by virtue of the respondent's failure to adhere to the mandatory provisions, the petitioner prays that the respondent's opposition to the petition be stuck out in limine.

[7] The petitioner is suggesting that every respondent has to file a notice of intention to appear in a winding up court even though the respondent itself has been summoned to appear and defend the winding up petition.

[8] Rule 28(1) of the Companies (Winding Up) Rules 1972 reads:

> Every person who intends to appear on the hearing of a petition shall serve on the petitioner or his solicitor notice of his intention. The notice shall be signed by the person or by his solicitor and shall give the address of the person signing it and shall be served or if sent by prost shall be posted in such time as in ordinary course of post to reach the address not later than 12.00 o'clock noon of the day previous to the day appointed for the hearing of the petition. (2) The notice may be in form 8 with such variation as circumstances may require. (3) a person who has failed to comply with this rule shall not, without special leave of the Court, be allowed to appear on the hearing of the petition.

[9] Firstly, r 28(1) does not refer to the respondent. If the intention of the rule is to include the respondent of a petition, it would have made it very clear that the respondent itself would have to file the notice of intention to appear. Rule 28(1), refers to 'every person who intends to appear'. It is clear that the respondent by the service of the petition is a party to the petition and

he needs not give notice of his intention to appear. The respondent is already a party to the winding up petition. It appear as the respondent. The respondent notice is made when they file the affidavit in opposition seven days before the petition is to be heard.

[10] The intention of r 28(1) can be clearly seen in the Form 8 as referred to by r 28(2). Form 8 reads:

> Take notice that AB, of (a) creditor for $ … of (or contributory holding (b) … shares in) the above company intend to appear on the hearing of the petition advertised to be heard on the … day of … 2000, and to support (or oppose) such petition.

[11] From the said Form 8, it is clear that r 28(1) only applies to 'any other person' apart from the respondent who intends to appear at the hearing to support or oppose the petition. It never had the intention of instructing the respondent to file the notice of intention to appear. The above proposition is further fortified by reading the opening wordings of s 221(2) of the Companies Act 1965, which reads: 'The court may on the petition coming on for hearing or at any time on the application of the petitioner, the company or any person who has given notice that he intends to appear on the hearing of the petition ...'.

[12] Section 221(2), clearly calls on three categories of persons, namely the petitioner, the company and any person who has given notice to appear who may appear at a hearing of a winding up petition. Thus, these is no indication that the company need to file a notice of intention to appear as what 'any other person' has to do.

[13] There is a divided line of High Court authorities on this issue. There seem to not be any higher authority on point in Malaysia. In *Sun Microsystems (M) Sdn Bhd v KS Eminent Systems Sdn Bhd* [2000] 4 MLJ 565, Abdul Hamid Mohamad J (as he then was) was of the view that the words 'every person' in r 28(1) is not applicable to the respondent as the respondent is already a party to the proceedings and by filing the affidavit in opposition it clearly showed the respondent's intention to appear at the hearing to oppose the petition. Hence, there was no necessity to give any further notice.

[14] In *Mitsuo Nagamura lwn Aero Works (Melaka) Sdn Bhd* [1996] 4 MLJ 209, Abu Samah JC (as he then was) allowed the preliminary objection raised on the grounds that the notice under r 28(1) was not filed and granted the petition. His Lordship upon making references to the position under English law and statutes which are similar to ours, held that the respondent was not exempted from filing the said notice.

[15] Zakaria M Yatim J in *CH Contruction and Trading v Langkah Cergas Sdn Bhd* [1994] MLJU 418; [1994] 1 LNS 20, took the opportunity to consider the legal position and practice in Australia and England and concluded that it was mandatory for the respondent to file the said notice. The learned judge further added that even though counsel for the respondent may have appeared in court a number of times for the hearing of other application, but it did not entitle the company to appear on the hearing of the petition itself in the absence of the notice of intention to appear.

[16] Similarly in *Co-operative Central Bank Ltd v Escalation Enterprises Sdn Bhd* [1996] MLJU 344; [276] MD 3, the court held that the failure by the respondent to comply with r 28(1) did not permit them the right to be heard.

[17] The petitioner in the present case relies on the authorities decided by the High Court by Zakaria Yatim J in 1994 and two cases decided by Abu Samah JC in 1996. These two authorities do suggest that a notice of intention to appear must be filed by a respondent company who has been petitioned to appear to defend the winding up proceedings. The petitioner also relies on a decision of the Court of Appeal in Singapore (*Four Pillars Enterprises Co Ltd v Beiersdorf Aktiengesellschaft* [1999] 1 SLR 737), but that case does not support the proposition that has been put forward by the petitioner that a respondent in a winding up petition has to file a notice of intention to appear before a respondent can be present to oppose a petition where the respondent has been named a party.

[18] The petitioner does refer to *Sun Microsystem (M) Sdn Bhd v KS Eminent Systems Sdn Bhd*, which was also referred to in the respondent's submissions. This is a decision that had the benefit of both the 1994 and 1996 decision and the decision of Abdul Hamid Mohamad J in that case is a succinctly written after considering the earlier decisions made by Abu Samah JC and Zakaria Yatim J. Abdul Hamid Mohamad J did conclude that r 28(1) does not apply to the respondent in a petition.

[19] This court finds that the approach taken by Abdul Hamid Mohamad J be preferred, for the following reasons. His Lordship having had the opportunity to revisit the r 28(1) issue, considered the reasons given by Abu Samah JC and perused the sections of the Companies Act and came to a sound decision that r 28(1) was not applicable to respondents in a winding up matter. His Lordship had looked at Form 8 and came to a sound conclusion. His Lordship said this at p 567 para D onwards:

> I was shown a judgment of Abu Samah JC (as he was then) in the case *Mitsuo Nagamura v Aero Works (Melaka) Sdn Bhd* [1996] 4 MLJ 209. The learned judicial commissioner held that a respondent in a winding up petition was not exempted from serving the notice of intention to appear as required by r 28 of the

Companies Winding Up Rules 1972. In other words, a respondent who fails to serve the notice on the petitioner is not allowed to appear to oppose the petition. A

I adjourned my decision and asked both learned counsel to do further research on the issue, I now give my decision.

I think I should start with the Companies Act 1965 under which the Companies (Winding Up) Rules 1972 are made. Section 221(2), inter alia, provides: 'The court may on the petition coming on for hearing or at any time on the application of the petitioner, the company, or any person who has given notice that he intends appear on the hearing of the petition …' B

That subsection goes on to talk about the directions that the court may give. True that subsection talks about what directions the court may give and is therefore not directly relevant to the present discussion. But, it should be noted that the clause 'who has given notice that the intends to appear on the hearing of the petition', refer only to 'any person' and not the petitioner or the company (respondent). True that it cannot apply to the petitioner. But, it is also clear that the clause does not apply to the company (the respondent). Otherwise it would not have been drafted that way. C D

[20] At p 568, His Lordship went on to look at the words in r 28 and Form 8 which is captioned as 'notice of intention to appear on petition' and said: It goes without saying that Rules made under an Act should be read subject to the Act. Under s 221(1) of the Act, it is clear that the clause 'any person who has given notice that he intends to appear on the hearing of the petition' does not refer to the petitioner or the company (respondent). That same clause is repeated in r 28. Surely, it has to be read in the light of the provision of the Act. E F

Secondly, Form 8 clearly mentions 'creditors' or 'contributory'. They, up to that stage are not parties to the proceedings and are the most likely people who would like to appear on the hearing of the petition. Surely the respondent, in most cases, would appear. But, the respondent is already a party. In this case, the respondent has already filed an affidavit opposing the petition. The petitioner already knows that the respondent wants to appear on the hearing of the petition. Otherwise the respondent would not have filed the affidavit in opposition of the petition. So, in the case of a respondent, there is no need to give notice anymore. G

The provision in r 28(2) that the notice may be varied as circumstances may require in not valid argument for saying that the form envisages a variation to include the respondent. If the respondent is required to give the notice, the respondent, being the original party besides the petitioner, should be the first to be mentioned. H

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[21] The above passage is clear that the law as stated by His Lordship Abdul Hamid Mohamad J is the proper position of the law. His Lordship had looked at the provisions of the Companies Act 1965 and the rules and read the rules in accordance to the Act. This court should be guided by the

decision of Abdul Hamid Mohamad J and dismiss the petitioner's preliminary objection in the present case.

[22] A further argument, why the petitioner's preliminary objection is not in line with the intention of the rule or the Companies Act, can be seen as the intention of the r 28 is for mere notice, that is, in the event a party who has not been made a party to the petition and that certain party intends to appear at the hearing to either oppose the petition or to support the petition, that party must give notice of intention to appear, to enable the petitioner to file the list of parties that support and oppose the petition as required under r 29(1) and Form 9. It is intended as a notice. Under the Rules, it is clear that if the respondent wishes to oppose the petition, the respondent need only file their affidavit in opposition seven clear days before the hearing of the petition. There is no need for a notice of intention to appear. The intention is already made clear. The words of the rule are clear: to make known the intention.

[23] Rule 29(1) reads:

> (1) The petitioner or his solicitor shall prepare a list of the names and addresses of the persons who have given notice of their intention to appear in Form 9 on the hearing of the petition and of their respective solicitors.
>
> (2) On the day appointed for hearing the petition a fair copy of the list or if no notice of intention to appear has been given, a statement to the effect shall be handed by the petitioner or his solicitor to the court prior to the hearing of the petition.

This rule is clear that a party who is not a party to the proceedings need to give notice of their intended appearance. There is no requirement for the petitioner or the respondent who are already parties to the petition to file such a notice.

[24] Based on the above considerations, the court finds that the petitioner's preliminary objection is without merit and therefore be dismissed with costs.

THE PETITIONER'S PETITION AND THE RESPONDENT'S APPLICATION TO STRIKE OUT

[25] The court shall now proceed to consider the petitioner's petition (encl 1) together with the respondent's application to strike out the petition (encl 8).

[26] The petitioner raised the issue that the respondent's notice of motion dated 22 October 2008 (encl 8) is flawed as it does not stipulate the provision on which the respondent relies to strike out the petition. The petitioner submits that there is no 'intitulement' in the respondent's motion to strike out. The petitioner takes the position that the motion must have an 'intitulement' placed on it for the motion to be properly placed before this court.

[27] The court cannot accept this proposition by the petitioner. The 'intitulement' are headings that are referred to in the originating processes. So the plaintiff or a petitioner who moves the court through any originating process, namely originating summons, originating motions or a petition will have to state the law or section under which the originating process is being employed to move the court. The 'intitulement' once employed, cannot be removed or amended unless an application to amend is made by the applicant or the petitioner to the court.

[28] Thus, the obligation is on the applicant of the originating process to state the intitulement on the originating process. Here, in this winding up petition, the petition is the process under which the petitioner has moved this court to wind up a company, hence the intitulement referred to in the petition is 'in the matter of s 218(1)(e) of the Companies Act 1965'.

[29] There is no provision in law that allows the respondent in this matter to change the intitulement on the petition or to change the heading in a motion filed under a petition in order to file an application to strike out the said petition. The petitioner has put forward a proposition that the respondent did not include the intitulement on the notice of motion. The notice of motion is not an originating process and therefore it must follow the intitulement of the originating process, ie the petition. The intitulement of the petition is the heading and it cannot be changed by the petitioner or respondent every time the parties file interlocutory application to a petition or other originating processes (originating motion or originating summons).

[30] In any event, the Federal Court in *Megat Najmuddin Dato' Seri (Dr) Megat Khas v Bank Bumiputra Malaysia Bhd* [2002] 1 MLJ 385; [2002] 1 CLJ 645 has clearly set the practice that the courts must not entertain frivolous technical objections that detract from the crux of the matter. The submission by the petitioner on the preliminary objection is clutching at straws to defeat the respondent's motion.

[31] In support of the proposition that the intitulement cannot be changed by the respondent or even the petitioner without a formal application is the decision of High Court in *John Ang & Jega (suing as a firm) v Kulasingam a/l*

Sinatamby [2001] 2 MLJ 605 at p 613, where the High Court referred to the decision in *Salutory Avenue (M) Sdn Bhd v Malaysia Shipyard and Enginering Sdn Bhd* [1999] 3 AMR 2659, where it was stated: 'It follows therefore that since the plaintiff did not state precisely the nature of the relief or remedy sought, then the plaintiff should make a formal application to this court for leave to amend the originating summons in encl 4. But alas, there was no such formal application'. This clearly shows, the headings, in any originating processes or a petition, cannot be changed by the petitioner without the consent of the court.

[32] In short, to borrow the words of Abdul Malik Ishak J in *John Ang & Jega* at p 616: 'It was an attempt to whittle down the impact of encl 2, and that objection was indeed frivolous and vexatious. It was a waste of precious judicial time. Even if encl 2 was wrongly intituled, it made not a whit of a difference. This court in its original jurisdiction has the capacity and the inherent jurisdiction to hear and entertain encl 2.'

[33] The objection raised by the petitioner that the motion is flawed is frivolous and vexatious, and this court has to see if the petition filed by the petitioner is proper: namely is the petitioner a creditor and is the respondent insolvent? This is a court of justice and justice will only be done if this court goes into the crux of the matter between the petitioner and the respondent and decide if the petitioner has a right in law to file a petition against the respondent, thus, it is the duty of the petitioner to prove that the petitioner is a creditor and if the petitioner is found to be a creditor, then, is the respondent insolvent.

[34] The petitioner takes the view that the respondent's proposition on the issue in the motion to strike need not be taken at the motion but at the petition proper. To the court there are ample cases decided in our jurisdiction that confirm that the winding up court has the power to hear a motion to strike out a petition either under O 18 r 19 of the Rules of the High Court 1980 or under the inherent jurisdiction of the winding up court.

[35] The petitioner has referred this court to the decision of *Boey Oi Leng (trading as Reka Construction & Trading) v Trans Resources Corporation Sdn Bhd* [2001] MLJU 566; [2002] 1 CLJ 405. This case clearly looks at the law in Malaysia and confirms that a respondent may file an application to strike out a petition and the court can entertain such a petition either under O 18 r 19 or the Rules of the High Court or under the court's inherent jurisdiction to hear and determine an application to strike out a petition filed under s 218 of the Companies Act 1965. Low Hop Bing J in *Boey*'s case having looked at the decisions came to the conclusion that a winding up court can entertain an application under O 18 r 19 of the Rules of the High Court. This

proposition has been will settled by the Supreme Court in 1996 in the case of *Si & Si Sdn Bhd v Hazrabina Sdn Bhd* [1996] 2 MLJ 509; [1996] 3 CLJ 657.

[36] The court is of the view that this court has the jurisdiction to hear and decide a motion to strike out a petition under O 18 r 19 and under the inherent jurisdiction of the court and the Supreme Court in *Si & Si Sdn Bhd v Hazrabina Sdn Bhd* also is the authority for the proposition that even if the source is not stated in the application, the winding up court may strike out pursuant to the inherent power of the court. This court is referred to p 408 (CLJ) (pp 5–6, MLJU) of *Boey*'s case where Low Hop Bing J said:

> In *Buidcon-Cimaco*, Abdul Hamid Mohamed J, (now JCA) also touched on the question as to whether the court has the inherent jurisdiction to strike out a s 218 petition and held that he was bound by the decision of the Supreme Court in *Si & Si Sdn Bhd v Hazrabina Sdn Bhd* [1996] 3 CLJ 657 that the High Courts have jurisdiction to strike out a winding up petition under its inherent powers, even though the source was not state there.

[37] In the present case, the petitioner has filed a petition on the ground that there is a debt due and payable by the respondent to the petitioner. The petitioner claims the debt to be RM19,894.36 based on a letter dated 23 August 2004 given by the respondent to the petitioner. The letter on which the petitioner based their claim is exhibited as exh 'B' in the petition.

[38] The main question in any winding up petition is: Is the respondent insolvent? In this case the respondent has placed with the respondent's solicitor a sum which is more than the sum claimed by the petitioner, to indicate to both the petitioner and this court that the respondent is solvent and capable and able to settle all its debts as and when they fall due. In that sense the respondent is not insolvent. An order to wind up a company can only be given if the company is insolvent.

[39] Under s 218(1)(e) of the Companies Act 1965, the court may order the winding up if — (e) the company is unable to pay its debts. Thus, the court may order the respondent to be wound up, if the respondent cannot show financial resources to settle its debts. The definition of inability to pay the debt, is referred to in s 218(2)(a). It is trite law, that the presumption under s 218(2)(a), the inability to pay the debt is a rebuttable presumption. To support this proposition of law, the court refers to the decision in *Dayakuasa Holdings Sdn Bhd v Kayaal Holdings Sdn Bhd* [2003] 2 MLJ 263, where the court held:

The presumption under s 218(2)(a) is a rebuttable presumption, as a company failing to heed a valid statutory demand would not be wound up if it can establish by independent evidence that it is solvent (following the case of *Malaysia Air Charter Company Sdn Bhd v Petronas Dagangan Sdn Bhd* [2000] 4 CLJ 437.

[40] In *Securicor (M) Sdn Bhd v Universal Cars Sdn Bhd* [1985] 1 MLJ 84, the court held:

> By s 218(1) of the Companies Act the court may order the winding up of a company if it is unable to pay its debt. By s 218(2)(a) the company shall be deemed unable to pay its debts if a creditor to whom the company is indebted in a sum exceeding RM500 then due has made a demand for the same and the company has for three weeks thereafter neglected to pay the same. It is to be noted that if is not the neglect to meet the demand of the creditor that gives the jurisdiction to the court to order that the company be wound up but the inability of the company to pay its debts. It is the presumption arising from the neglect to meet the demand that gives the court the jurisdiction. This presumption is rebuttable.

[41] Based on the above proposition of law, the respondent had informed the petitioner that there is no debt due and had also indicated to the petitioner that the respondent has placed the sum RM20,000 with the solicitors for the respondent, Messrs Zain Johnson & Associates. Thus, this shows that the respondent is solvent and can settle the debt if the debt is due and payable. The petitioner now has to take this claim to the civil court to try the claim and resolve the dispute. The respondent has always maintained that the debt is not due and that the petitioner is not a creditor. It is also trite law that a petitioner cannot use the winding up court to try a common law action (see *Malayan Resourses Corporation Bhd v Juranas Sdn Bhd* [2002] 3 MLJ 169).

[42] If the presumption of insolvency is rebutted, then the court has no jurisdiction to hear the petition to wind up. The court's jurisdiction is only available if the respondent has not shown any evidence to show that the respondent is solvent. In the matter before this court, there is clear evidence that the respondent can settle the sum and has sufficient funds to carry on its business.

[43] The petitioner has used the winding up petition as a means to pressure the respondent to pay a so-called debt, which is not a debt. The petitioner is attempting to use the winding up petition as a debt collecting agency (see *Malta Timber Products Sdn Bhd v N & P Construction Sdn Bhd* [2004] 1 MLJ 199).

[44] The proposition is supported by the action of the petitioner. The petitioner had upon presentation of the petition informed the respondent's bank about the presentation of the petition. The petitioner had taken upon themselves to notify the bank. This was done to damage the respondent's reputation and in the hope that the bank will freeze the respondent's account, which then will start a whole chain of misadventure and financial distress for the respondent. The petitioner had knowledge that the respondent had the means to settle the debts as it fell due, but with the presentation of the winding up petition and the possible freezing of the account, there would have been more creditors who would have supported the petition as supporting creditors and that could have cause debts that are not yet due to become due or payable. The petitioner knew full well, that once the bank was informed of the presentation of the winding up petition, it would be inevitable that the bank would freeze the account. This in itself shows the action of the petitioner to be vexatious, scandalous and frivolous. The filing of the petition was also with the intention to cause serious prejudice and or to embarrass the respondent and to hurt the respondent company, in short the actions were malicious. If that was not the intention, why then notify the respondent's bank. The petitioner has full knowledge that the respondents are financially sound and capable of settling their debts as the fall due. In actual fact, in this case the petitioner knew what was the collectables that were due to the respondents from the home owners. The petitioner had agreed to become debt collectors for the respondent.

[45] The petition was served on the respondent's registered address on the 19 September 2008. The petitioner had vide their solicitors informed the respondent's bank (Maybank Bhd) on about the same date by letter that they had filed the petition thereby causing the Bank to call the respondent and threatening to freeze the account. This act of the petitioner had caused damage and embarrassment to the respondent. There is no such requirement in the Companies Act 1965 or the Winding Up Rules to take such positive steps by the petitioner. The rules only provide for the advertisement of the petition and nothing more. The very letter informing the Bank of the winding up petition on a debt, which is not a debt, by the petitioner is sufficient to injure the respondent's reputation.

[46] Every winding up petition, which is based on the premise that the respondent is unable to pay its debt must be made by a creditor. Thus, another important question to ask: is the petitioner a creditor? Under s 218(2)(a) only a creditor or persons whom the company is indebted to is capable of presenting a petition.

[47] In *Wong Thai Kuai & Anor v Kansas Corp Sdn Bhd* [2007] 4 MLJ 33, this court has held that:

> The present petition was filed by the petitioner on the strength of a statutory notice issued by the petitioner under s 218 of the Act, on the assumption that the respondent has failed or unable to pay its debt during the twenty one days mentioned in the notice. In this case, there is no judgment obtained by the petitioner against the respondent in respect of the amount claimed. That being the case, the petitioner must satisfy the court that they are 'creditors' and the amount claimed as stated in the s 218 notice was actually 'owing and due'. The notice of indebtedness issued under s 218 is not evidence of the debt. In other words, the petitioner must prove that they are 'creditor' and the respondent is a 'debtor'. If the debt is disputed substantially and the petitioners are not considered as 'creditors', then the petitioners have no locus standi to file the petition for winding up of the respondent based on the said notice. (The court in *Wong Thai Kuai* referred to and accepted the decisions in *Syarikat Mohd Moor Yusof Sdn Bhd v Polibina Engineering Enterprise Sdn Bhd (in liquidation)* [2006] 1 MLJ 446 and the case of *Jurupakat Sdn Bhd v Kumpulan Good Earth* [1973] Sdn Bhd [1983] 3 MLJ 49).

[48] Thus, it is crucial that the petitioner establishes that it is a 'creditor'. The basis of the petitioner's claim is based on a letter dated 23 August 2004 written by the respondent. For case of reference, the court reproduces the said letter in its entirety:

> 23rd August 2004
>
> Perbadanan Pengurusan Bella Vista
>
> Att: Mr Lai Siew Khee
>
> President
>
> Dear Sir,
>
> COLLECTION OF OUTSTANDING MAINTENANCE CHARGERS FOR BELLA VISTA
>
> We refer to the above and meeting held at our office between Mdm Chee Mui Chai, your goodself and the undersigned on your proposed to collect all the outstanding charges as at 31th May 2004 on our behalf.
>
> We wish to inform you that our management had agreed to your proposal subject to the following conditions:
>
> (a) That you will collect all outstanding charges in full from the unit owners on our behalf with the following incentives:
>
> (i) Collection of outstanding charges of more than RM10,000.00 and below RM50,000.00 a 10% commission on the amount collected will be contributed to your management fund;

(ii) Collection of outstanding charges of more than RM50,000.00 and below RM100,000.00 a 20% commission on the amount collected under this blanket will be contributed to your management fund;

(iii) Collection of outstanding charges of more than RM100,000.00 and below RM150,000.00 a 30% commission on the amount collected under this blanket will be contributed to your management fund;

(iv) Collection of outstanding charges of more than RM150,000.00 and above a 40% commission on the amount collected under this blanket will be contributed to your management fund

(b) The incentive above in (a) is given sole on the Service Charges and Interest Charges collected only.

(c) The above incentive is valid for a period of 6 months from this letter and as a good gesture, we agreed to waive 50% of the outstanding interest during this two months period commencing from the date of this letter

(d) In addition to that you must give us a letter of indemnity to indemnify us, in the event that there is any dispute between the unit owners and your management with regard to the collection that you have collected.

Further, to the above, as a matter of goodwill we would like to confirm that RM40,000.00 will be given to the management to maintain the property. For a start, we have paid the premium for Fire Insurance Policy for the period 15th March 2004 to 14th March 2005 amounted to RM20105.64 and allowed you to bill and collect on our behalf. The balance of RM19,894.64 will be given to you when we collect our outstanding maintenance charges from the defaulters.

If you are agreeable to the above kindly give us your letter of acceptance before we release the related documents to you.

Thank you.

Yours faithfully,

CA MANAGEMENT SRTVICES SDN BHD

Sgd

FOO SEE HEE

General Manager

Property Operation.

[49] The above letter, seems to document the proposal given by the petitioner to the respondent. The petitioner had agreed to become the 'debt collector' for the respondent, as there were management fee that was due and payable by homeowners to the respondent. To assist the petitioner, the respondent agreed to the proposal given by the petitioner provided some additional terms, were agreed to by the petitioner. The provisos imposed by the respondent, is found on paras (c) and (d) (of the said letter) namely, that the incentives were valid for six months and the petitioner is to give a letter of indemnity. If the petitioner agreed to the terms, the respondent was willing to give a further incentive, where the letter reads, 'Further to the above' the respondent was willing to give the petitioner a sum of RM40,000 if the petitioner collected the outstanding management sum due to the respondent. The intention of the letter is clear, the petitioner is only entitled to the RM40,000 if they agreed to become the 'debt collector' for the respondent. As the petitioner neither collected the outstanding sums within six months or gave the letter of indemnity to the respondent, the proposal found in the letter dated 23 August 2004, was never accepted by the petitioner. If the petitioner never collected the outstanding sums for and on behalf of the respondent, then they are not entitled to the RM40,000 which was promised to the petitioner as a matter of goodwill. As the paragraph begins with the words, 'Further to the above', it simply means that further to the agreement above, if parties were working together, the respondent was willing to give the petitioner a further benefit as a matter of goodwill, that is a payment of RM40,000.

[50] There is no evidence that the petitioner did any collection for the respondent. The petitioner has also not exhibited the letter of indemnity that the respondent required from the petitioner before the collection can be done. In short, the proposal that is evidenced in the letter was never acted upon. Since there is no relationship between the petitioner and the respondent, the goodwill payment is not due as there was total failure of consideration.

[51] The claim of RM19,894.36, by the petitioner against the respondent is being disputed by the respondent, as the petitioner did not comply with the terms of the proposal contained in the letter dated 23 August 2004.

[52] Any claim based on the letter at this stage is baseless, as the petitioner will have to prove that it had given the indemnity and had collected the debts outstanding from and on behalf of the respondent and is entitled to the said RM19,894.36. As there was no letter of indemnity and no proof that the petitioner collected the sums as agreed in the said letter, the goodwill payment is not payable to the petitioner yet.

[53] The court finds that there is no evidence to confirm that the petitioner is a creditor and is entitled to present this petition as against the respondent nor is there any evidence that the petitioner is entitled to the RM19,894.36 any part thereof.

[54] Based on the above, the court is of the view that the petition is an abuse of process where the petitioner not being a creditor has presented the petition knowing full well that they are not entitled to the sum or any part thereof.

[55] There is a dispute between the parties as to what the intention was and the interpretation of the said letter dated 23 August 2004. This dispute should not and cannot be resolved by a winding up court. As it stands, until the dispute is resolved, namely does the respondent owe any money to the petitioner, there is no debt due. There is at the moment, no debt and there is no evidence that the petitioner is a creditor. Based on the above, the petitioner has no locus to present a petition to wind up the respondent. The first threshold that the petitioner needs to establish is that it is a creditor. In their case there is no debt yet. There is a promise to pay, provided certain conditions are met, there is no proof that the petitioner collected the debts for the respondent. The petitioner has not even produced the indemnity letter, which was a condition precedent.

CONCLUSION

[56] Based on the above considerations the court makes the following rulings:

(a) that the petitioner's preliminary objection is dismissed with costs;

(b) the respondent's application (vide encl 8) to strike out the petition is allowed with costs; and

(c) the petitioner's petition to wind up the respondent company (encl 1) is dismissed with costs.

Petitioner's preliminary objection and petition to wind up dismissed with costs and respondent's application to strike out petition allowed with costs.

Reported by Ashgar Ali Ali Mohamed